STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE EDWARD WILSON,

Defendant-Appellant.

UNPUBLISHED
June 23, 1998

No. 190761
Otsego Circuit Court
LC No. 94-001973 FH

Before: Wahls, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), and second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3). He was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to concurrent prison terms of 96 to 270 months and forty to seventy-two months for his respective convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arise from injuries suffered by his then ten-week-old son. Defendant first argues that the trial court erred by admitting evidence of injuries suffered by another infant while in defendant's care because the evidence could only have shown that defendant acted in conformity with this prior bad act. Prior bad acts evidence is admissible under MRE 404(b)(1) if the evidence is offered for a proper purpose, including, but not limited to, intent, identity, and absence of mistake. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The evidence must also be relevant under MRE 402, and the court must find that the probative value of the evidence is not substantially outweighed by its prejudicial effect. MRE 403. We conclude that the trial court abused its discretion in admitting this evidence to show identity, but did not abuse its discretion in admitting the evidence to show absence of mistake. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Although defendant put the issue of identity into question by arguing that a babysitter had committed the abuse, in *People v Perry*, 172 Mich App 609; 432 NW2d 377 (1988), this Court held that for prior acts to be admissible to show identity,

> it is not enough that the crime or crimes be the same or similar in title; instead both crimes must involve such distinctive, unique, peculiar or special characteristics as to justify a reasonable juror in inferring that they were the handiwork of the same person. Our Supreme Court has noted that the distinguishing characteristics personalize the crime and thereby act as the defendant's signature. [*Id*. at 619 (citation omitted).]

In *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995), this Court allowed the use of prior bad acts to show identity because

> [b]oth the prior and present acts involved the perpetrator's entry into a home when the woman was alone and the door was unlocked. Contrary to defendant's assertion, all three acts involved a struggle. In all three cases, the victims lived within walking distance of defendant's residence and, although each case involved the removal of clothing, sexual intercourse did not occur. There was violence against all the victims resulting in injuries above the waist, including the neck. Furthermore, after viewing the photographs of all three victims, the trial court concluded that the victims were similar in appearance. [*Id*.]

Here, the prior acts evidence was not so similar as to "earmark the charged offense as the handiwork of the accused." *Perry*, *supra* at 609. The only similarities were that infants were found to have been injured after they had been in defendant's care, and he denied the abuse and blamed another party. Moreover, the injuries themselves were not so similar as to allow the prior acts as evidence of identity.

However, defendant took the position that the injuries to his son could have been caused by accident. In *People v Morris*, 139 Mich App 550; 362 NW2d 830 (1984), the prosecution introduced testimony that the defendant and the victim had been in two altercations prior to the one in which the defendant had killed the victim to show that the killing was not an accident as alleged by the defendant. This Court affirmed the trial court's ruling that the testimony was admissible because "it tends to provide defendant's motive, intent or absence of accident." *Id*. at 557. It went on to say that "[t]his Court has twice ruled that evidence of a prior assault is admissible to show intent, particularly where the defense of accident is asserted." *Id*.

During the investigation phase of defendant's prior trial, defendant first asserted that he did not know what happened to cause the injury to the child. He later suggested that the day care workers had caused the injuries. Finally, he admitted to shaking the infant and dropping her on the floor by accident. Similarly, in the present case defendant initially claimed that he did not know how his son was injured. He "racked his brain" and came up with several theories: (1) he may have hugged the child too hard, thus causing the rib fracture; (2) in an attempt to remove the child from a swing, his leg became caught, and the tugging on the child to free him may have fractured the infant's leg; (3) a three-year-old child visitor may have pulled the baby's leg through the slats of the crib when no one was watching; and (4) the babysitter injured the baby. The similarity of the excuses offered by defendant in the two episodes supports the use of the prior act to show intent since defendant asserted the defense of accident. Therefore, although the evidence was not admissible to prove identity, it was admissible to show intent.

Further, in light of the trial court's limiting instruction that was given before the introduction of the evidence, we find that the probative value of the testimony was not outweighed by its prejudicial impact.

Defendant next argues that the lower court erred when it allowed the prosecution to use the prior acts evidence to impeach a witness because the evidence was irrelevant and unrelated to his guilt. However, defense counsel and the prosecution stipulated that there would be no limitation on the use of this evidence if the court allowed the evidence to be used. Therefore, this issue is unpreserved and review is not warranted. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Next, defendant argues that the prosecutor made improper remarks during his closing argument. However, defendant did not object to the allegedly improper remarks and, therefore, this issue is not preserved for appellate review. *Grant*, *supra* at 553.

Finally, defendant argues that defense counsel committed six fatal errors, thereby denying him the effective assistance of counsel. To support a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

First, defendant claims that counsel was ineffective by failing to "immediately object" when a witness went to the witness stand holding the victim. The record reveals that the witness was called to the stand at 10:09 a.m., and a bench conference was requested by defense counsel at 10:11 a.m. The infant was then removed from the courtroom. Thus, contrary to defendant's suggestion, counsel was prompt in objecting to the infant's appearance on the witness stand.

Second, defendant asserts that counsel failed to object to questioning regarding a witness's attendance at defendant's prior trial. At the *Ginther*[1] hearing, trial counsel stated that he did not object to the questioning because he wanted the jury to know that defendant had been acquitted in his first trial. *Id*. Defendant has made no showing that these few questions prejudiced his case. It appears that this was a matter of trial strategy, which this Court will not second-guess. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Nor will this Court substitute its judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Third, defendant contends that defense counsel failed to object to a trooper's reference to the fact that the victim was removed from the home. Defense counsel testified at the *Ginther* hearing that he believed the trooper's statement was innocuous because common sense would tell people that if there was an investigation of child abuse in the home, the child would likely be removed pending an investigation. It may be considered sound trial strategy to not draw attention to evidence that is not helpful to defendant's case, see *Barnett*, *supra* at 338, and *Kvam*, *supra* at 200.

Next, defendant argues that defense counsel failed to have the babysitter's statement admitted into evidence. At the *Ginther* hearing, trial counsel stated that originally he moved to have the statement admitted "as it was written; not so much for the content, but for the way [it exhibited] almost psychotic behavior on the part of the witness, and I wanted the jury to see that." When the lower court

ruled that the statement could be admitted, but that it would be typed first, trial counsel withdrew his request because he "didn't feel that that was in Mr. Wilson's best interest." Thus, the withdrawal of the statement was trial strategy that we will not second-guess on appeal. *Barnett, supra*.

Finally, defendant alleges that defense counsel denied him the opportunity to testify on his own behalf. At the *Ginther* hearing, the prosecutor pointed out that in an earlier prosecution defendant had testified on his own behalf, indicating that he knew he had the right to testify despite what his attorney may have told him. Trial counsel testified that he never told defendant that he was not allowed to testify. The trial court found defendant unbelievable and stated that trial counsel was more credible based on prior experience and the lower court's knowledge of counsel's reputation. Since the trial court is in a better position to evaluate credibility, we see no basis for reaching a contrary conclusion.

Affirmed.

/s/ Myron H. Wahls
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).